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Supreme Court of the United States

OCTOBER TERM, 1955.

No. 243

SCHWEGMANN BROTHERS GIANT SUPER MARKETS, ET AL.,
Defendants-Appellants,

versus

HOFFMANN-LA ROCHE, INC.,
Plaintiff-Appellee.

HOFFMANN-LA ROCHE, INC.,
Plaintiff-Appellant,

versus

SCHWEGMANN BROTHERS GIANT SUPER MARKETS, ET AL.,
Defendants-Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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SCHWEGMANN BROTHERS GIANT SUPER MARKETS, ET AL.,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The petition of Schwegmann Brothers Giant Super Markets, a commercial partnership composed of John Schwegmann, Jr., Paul S. Schwegmann, Wilfred I. Meyer, Anthony Schwegmann, Charles Acquistapace, Ernest Barrios, and O'Neil Barrios, and of the individual partners, prays that a writ of certiorari issue to review the judg-

ment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on April 22, 1953.

OPINIONS BELOW.

The District Court issued a "fair trade" injunction May 15, 1953 (Tr. 28). June 23, 1954, the District Court denied plaintiff-appellee's petition for contempt but amended the judgment of injunction in accordance with plaintiff-appellee's petition (Tr. 159). The opinion of the District Court, June 11, 1954, is reported at 122 F. Supp. 781. The opinion of the Court of Appeals for the Fifth Circuit, April 22, 1955, affirming the District Court, is reported at 221 F.2d 326.

JURISDICTION.

The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED.

The statutes relevant to this case are the Louisiana Fair Trade Law (La. R.S. 51:391-396) (see appendix), the Sherman Antitrust Act (Act of July 2, 1890, Ch. 647, § 1, 26 Stat. 209, 15 U.S.C. § 1) as amended by the Miller-Tydings Amendment (Act of August 17, 1937 C.

690. Title VII, 50 Stat. 693, 15 U.S.C. § 1), and the McGuire Act (Act of July 14, 1952, 66 Stat. 631, 632, 15 U.S.C. § 45). The effect of the Miller-Tydings and McGuire Acts is to exempt fair trade resale price maintenance from the prohibitions of federal antitrust statutes.

INTRODUCTORY STATEMENT.

This case is a good example of the determination of fair traders to reach out and extend price fixing until the Sherman Act ceases to have meaning in the field of price competition. Here, fair traders go beyond the language of the fair trade laws—laws that should be narrowly confined because of their irreconcilable conflict with the basic philosophy of the Sherman Act. They go beyond the logic of the rationale for fair trade recognized in *Old Dearborn*—a rationale so shaky, so divorced from economic realities that it is tottering in spite of the respect this Court commands. *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183 (1936).

Schwegmann Brothers, defendant-appellant, operates two super markets, a large one on the outskirts of New Orleans and one somewhat smaller in the City. The large super market has an active drug department. Hoffmann-La Roche, plaintiff-appellee, is a New Jersey drug manufacturer that distributes its products widely in interstate commerce. (Plaintiff's complaint. Tr. 3.)

The question before this Court is a result of Hoffmann-La Roche's avowed purpose to extend the frontiers of

fair trade price fixing to sales of drugs made on physicians' prescriptions. This is new in fair trade price fixing.[1] Fair trade laws began in 1933. Never before has anyone thought that fair trade laws could apply to prescription drugs.[2] Petitioners submit that the elaborate fiction of good will supposedly incident to trade-marked goods (the rationale of *Old Dearborn*) has no application to drugs sold on prescription.

There is no constitutional question. There is no dispute as to the facts.

QUESTION PRESENTED.

The specific question presented may be stated as follows: Are drugs which are sold on prescription subject to fair trade price fixing where

—the drugs are dispensed in containers bearing no reference to the manufacturer's trademark, brand, or name,

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1 Hoffmann-La Roche's publicity release boasted: "In what is believed to be the *first prescription product suit under the Fair Trade Acts*, Hoffmann-La Roche Inc. . . filed a contempt of court action against Schwegmann Brothers. . ." Tr. 70. (Emphasis supplied.)

2 Prescription drugs are of two types: (1) Drugs which may be dispensed only on prescription, which must bear the statement "Caution: Federal law prohibits dispensing without prescription"; and, (2) drugs which may be dispensed without prescription, but which are in fact prescribed and dispensed pursuant to prescription. See 21 U.S.C.A. § 353(C)(2) (Supp. 1954); La. R.S. 37:1195; State Regulation of Drugs, 63 Yale L. Jour. 550 (1954); The Federal Food, Drug, and Cosmetic Act, 67 Harv. L. Rev. 632 (1954).

—the purchaser does not rely on the manufacturer's trademark, brand, or name, and

—the seller has no choice as to which drug to sell or to promote and the purchaser has no choice as to which drug to buy.

so that, in fact, the rational basis for fair trade is non-existent, since neither the seller nor the purchaser utilizes the alleged good will purportedly incident to the sale of trade-marked goods?

STATEMENT OF THE CASE.

On principle and as a business policy, Schwegmann Brothers maintains the right of merchants to fix their own prices on their own goods.[3]

Defendants are representative of a class of retailers who offer consumers a distinctive type of distribution that has consumer acceptance because it fills an economic need. It may be described as *minimum service mechandising.* Its principal characteristics are: self-service and cash-and-carry by the customers; no credit department, no delivery service, no expense maintenance; volume purchases, rapid

[3] See Schwegmann Brothers v. La. Board of Alcoholic Beverage Control, 216 La. 148, 43 So.2d 248 (1949); Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 385 (1951); Schwegmann Brothers v. Eli Lilly & Co., 205 F.2d 788 (5th Cir. 1953) cert. den., 346 U. S. 856 (1953); Schwegmann Brothers v. Dr. G. H. Tichenor Antiseptic Company, No. 20590, Louisiana Court of Appeal, in which a reexamination of the validity of the Louisiana Fair Trade Law is being sought. Schwegmann Brothers has never signed a fair trade contract.

turnover, and management by owners themselves. In short, defendants are not predatory price-cutters. They are bona fide merchants selling goods efficiently with minimum services, passing on the fruits of their efficiency to the public in the form of lower prices.[4]

Hoffmann-La Roche filed a fair trade suit against Schwegmann Brothers in the United States District Court for the Eastern District of Louisiana. At that time defendants were engaged in the Lilly litigation[5] in which the constitutionality of the McGuire Act was at issue. May 15, 1953, the Court entered an injunction judgment by default. This injunction prohibited Schwegmann Brothers from selling certain named commodities and "Any other commodity manufactured by and bearing the trade-marks, labels, brands, or name of [Hoffmann-La Roche]" for "less than those [prices] stipulated in contracts entered into by [Hoffmann-La Roche] with other retailers. . .or at prices less than those which may be shown on any future minimum retail price schedules issued by plaintiff." Tr. 30, 31.

After this judgment was entered, Schwegmann Brothers raised the prices on Hoffmann-La Roche's non-prescription products to conform with the manufacturer's price

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[4] As was said of defendants in another case:
"There is no suggestion in the records, nor in the pleadings, that defendants are using the plaintiff's products as 'loss-leaders' . . . The defendants simply are efficient retailers who pass on the fruits of that efficiency to the buying public in the form of lower prices."
Eli Lilly & Co. v. Schwegmann Bros. Giant Super Markets, 109 F. Supp. 269, 270 (1953), aff'd 205 F.2d 788 (5th Cir. 1953).

[5] Schwegmann Brothers v. Eli Lilly & Co., 205 F.2d 788 (5th Cir. 1953), cert. den. 346 U.S. 856 (1953).

schedules. These bear the Hoffmann-La Roche trademark or brand name and are considered over-the-counter merchandise. Schwegmann Brothers continued, however, to sell prescription products at its own prices in accordance with its general business policies. There was no question of flouting the court. On advice of counsel this policy was followed for prescription drugs of twenty-five other manufacturers which had obtained injunctions. Tr. 67, 124.

There is a clear distinction between sales of prescription drugs and sales of over-the-counter drugs. In an over-the-counter sale, the customer selects any one of a number of substantially similar items distributed by different manufacturers. In the purchase of a prescription drug, the customer has no choice and the druggist no opportunity to push a product; the customer buys and the druggist sells only the drug designated by the physician. This absence of a freedom of choice in the sale of a prescription drug makes for a real distinction; in over-the-counter sales where there is freedom of choice the manufacturer's good will and the use of the manufacturer's trade name may affect the customer's choice. In the prescription sale, therefore, the manufacturer's good will with the customer is either nonexistent or meaningless. Tr. 150, 152. The customer purchases only what is prescribed by his physician.

Other differences exist. Prescription drugs are dispensed in the quantities prescribed, usually from bulk containers in a retail pharmacy (Tr. 140, 141, 150 *et seq.*); other drugs are sold in the manufacturer's standard pack-

age sizes. Prescription drugs are dispensed bearing only the pharmacist's label, without reference to the manufacturer's trade name (Tr. 151, 152); other drugs are sold in the manufacturer's package containing the manufacturer's trade name.[6] Prescription drugs are known by trade name to the professional persons concerned with their use or sale, but rarely to consumers (Tr. 136 *et seq.*, 158); other drug items are known by their trade names among the consuming public. Manufacturers of prescription drugs direct their promotional activities solely to professional persons concerned with their use and sale (Tr. 136 *et seq.*); manufacturers of other drugs direct their promotional activities to the consuming public.

As stated in the opinion of the Court below, "A sine-qua-non of the constitutionality of the Louisiana Fair Trade Law is the right of a nonsigner to remove the trademark of the manufacturer and sell the commodity at his own price." 221 F.2d 326, 328 (1955). Mr. Justice Sutherland was careful to explain in *Old Dearborn:*

> "There is nothing in the act to preclude the purchaser from removing the mark or brand from the commodity—thus separating the physical property, which he owns, from the good will, which is the property of another—and then selling the commodity at his own price, provided he can do so without utilizing the good will of the latter as an aid to that end."
>
> *Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183, 195 (1936).*

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[6] In those rare cases where the prescribing physician directs the use of the manufacturer's trade name on the prescription label, fair trade prices were charged by Schwegmann's. Tr. 92, 116, 152, 158.

Now this is just exactly what Schwegmann Brothers did. The pharmacist removed the Hoffmann-La Roche label and substituted a Schwegmann label. Further, this is customary among druggists.[7]

In the sales which are the subject of this litigation the manufacturer's trade name did not appear on the container. Tr. 138 *et seq.* Asterol Ointment and Asterol Powder were delivered to the customer in the original containers from which the Hoffmann-La Roche prescription label had been removed and replaced by the Schwegmann Brothers prescription label. Exhibits 9, 10; Tr. 139 *et seq.* Gantrisin Tablets and Sedulon Syrup were dispensed from bulk containers and placed in new small containers with the prescription label affixed. Exhibits 7, 11; Tr. 139 *et seq.* When a physician, by specific instructions, required the pharmacist to show the trade name, Schwegmann's showed that trade name and charged the required fair prices. Tr. 92, 153.

Hoffmann-La Roche filed suit to punish Schwegmann Brothers for contempt. The District Court held that Hoffmann-La Roche's initial default injunction was defective for failure to comply with Rule 65(d) of the Fed-

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[7] All druggists do the same thing. Mr. Chapotel, in charge of seventeen drug stores of Katz & Besthoff, largest drug firm in New Orleans, testified that this was the uniform practice in his drugstores. Tr. 116. Less than 5% of current prescriptions require the pharmacist to compound the prescription. In the remaining instances, the pharmacist either removes the drug (whether it is in liquid or tablet form) from the manufacturer's bulk containers for dispensing in plain small containers furnished by the pharmacist, or dispenses the drug in its original container (in most cases involving salves and powders) after replacing the manufacturer's label with the pharmacist's label. Tr. 156 *et seq.*

eral Rules of Civil Procedure. The Court held however that Hoffmann-La Roche could utilize the fair trade law as a vehicle for price fixing on its drugs sold pursuant to prescription and entered an amended injunction decree, which explicitly covered the drug items manufactured by Hoffmann-La Roche and sold only on prescription. *Hoffmann-La Roche, Inc. v. Schwegmann Bros.*, 127 F. Supp. 781 (1954).

The Court of Appeals for the Fifth Circuit affirmed the decision of the District Court. *Schwegmann Bros. v. Hoffmann-La Roche, Inc.*, 221 F.2d 326 (1955).

REASONS FOR GRANTING WRIT.

A.

This Court's decision in this litigation will affect the pocketbook of every consumer in this country and the merchandising methods of hundreds of thousands of retailers.

B.

The decision of the Circuit Court does not give proper effect to *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183 (1936).

C.

The issue in this litigation is an important one—particularly in its impact on the national policy of free com-

petition embodied in the Sherman Act—and is one that can be settled only by the highest federal court.

D.

It is respectfully submitted that the decision of the Court below sanctions a radical and unwarranted extension of fair trade price fixing beyond the language of the statute and the logic of the rationale adopted in *Old Dearborn*. It is submitted respectfully that although the decision of the Court below purports to follow *Old Dearborn*, in fact it is in direct conflict with that decision of this Court.

(1) The Louisiana Fair Trade Law applies only "to the sale or resale of a commodity which bears, or the label or container which bears, the trademark, brand or name of the producer of the commodity." La R.S. 51:392. The McGuire Act uses the same language. When Schwegmann Brothers removed the Hoffmann-La Roche labels and sold the drugs in question in containers not bearing the manufacturer's trademark, brand or name, it complied with the express language of the law. As stated in *Old Dearborn*, "there is nothing to preclude the purchaser from removing the mark . . . and then selling the commodity for his own price, provided he can do so without utilizing the good will of the latter." Schwegmann Brothers did just exactly this.

(2) The legal argument for fair trade rests almost entirely on the *Old Dearborn* case. In that case the Court found a rationale for fair trade in one of the most

elaborate fictions ever constructed: Good will is purportedly incident to trademarked goods but separable from the physical goods so that the property value in the good will (trademark, brand, or name) persists in the manufacturer even after the goods are sold, and furnishes a sufficient basis for resale price maintenance; a purchaser (retailer) may own the physical goods fully but he cannot use the intangible good will (still the property of the manufacturer) unless he resells at prices fixed by the manufacturer (although, under Louisiana Fair Trade Law, the prices may be fixed by a contract between two parties who have no privity of contract with either the manufacturer or the retailer).

Petitioners submit that the time is ripe—or overripe—for this Court to re-examine the validity of fair trade legislation, to distinguish or overrule *Old Dearborn*. But, accepting for purposes of argument the principles laid down in *Old Dearborn*, it is submitted that the fair trade law is not applicable to the sale of a prescribed drug sold in a container bearing no reference to the manufacturer's trademark. Here, neither the retailer nor the purchaser had any freedom of choice in the sale and purchase of prescribed drugs. The seller did not utilize the manufacturer's good will and the purchaser did not rely on the manufacturer's good will.

(a) A physician prescribes a particular drug because the patient needs that drug; not, one hopes, because of "good will" that is, perhaps, really incident simply to an expensive advertising campaign.

(b) A purchaser is not a consumer shopping for merchandise. He buys what his physician prescribes, regardless of the manufacturer and regardless of the trade name. The very essence of the good will theory is that the consumer has a freedom of choice. The patient has no choice in the selection of a prescribed drug. It is also essential to the good will theory that the retailer have a freedom of choice; otherwise, it could not be said that selling one particular trademarked article over a competing product is taking advantage of the good will incident to the trademark. In the sale of a prescribed drug, however, the retailer too has no choice; he must fill the prescription by law. The physician may have some latitude, but the physician is not the purchaser and, so far as the physician is concerned, the prescription may be filled anywhere.

(c) The argument for the good will theory in a large part rests on the assumption that if a retailer reduces prices on a standard, nationally advertised product several adverse reactions may occur. First, the product may be cheapened in the eyes of the public, so that the public will come to think that the product is inferior. Second, the retailer reducing the price will not really push sales of the product, but will curtail sales, using the product as a loss-leader. Third, other retailers will push competing products, because they have to meet the competition of the reduced products and, of course, will favor the products with the larger profit margin. These are the arguments constantly advanced by proponents of fair trade price-fixing. Tr. 5. Accepting them at their face value, they have no application to prescriptions. First, there is no

question of the products being cheapened in the eyes of the patient; he does not even know what he is buying,[8] much less who the manufacturer is. Second, there is no question of Schwegmann's curtailing sales, because the pharmacist fills the prescription, and that is all there is to it. Finally, there is no question of competing products being pushed by other druggists, because the druggist is bound by the physician's orders.

Here, the retailer violated neither the letter nor the spirit of fair trade. Neither the product nor container bore the trade name of Hoffmann-La Roche. Nor did Schwegmann Brothers, the seller, utilize these trade names. The pharmacists, as they are required to do, sold Hoffmann-La Roche products without reference to the Hoffmann-La Roche trade names, which, in any event, were meaningless to the consumer.

No analogy exists with respect to unfair competition in which one manufacturer utilizes the trade name or other identification features of a competing manufacturer. *Cf. Ross-Whitney Corp. v. Smith, Kline & French Lab.*, 207 F.2d 190 (9th Cir. 1953); Am. Jur., verbo Trade Marks, Trade Names, and Unfair Competition, §§ 123, 143; 148

[8] The District Judge stated that he would take judicial notice of the prescription's usual illegibility and unintelligibility *quoad* the ordinary patient, although this statement is not incorporated in the Findings of Fact. See Exhibits 3-6. "It is impossible even for a registered pharmacist to ascertain from an inspection of the package or container in which Gantrisin, Asterol or Sedulon syrup are dispensed by defendants, the products contained in the dispensing container. The nature of the products contained in the dispensing container can be determined only upon chemical analysis or inspection of the original prescription on file in the pharmacist's prescription file." Tr. 159.

C. J., verbo Trade Marks, Trade Names, and Unfair Competition, § 104(3); A.L.I. Restatement of the Law of Torts, §§ 760, 712, 717, 741, 735 (Ill. 3). Nor is unfair competition resulting from retailer substitution of the goods of another manufacturer here involved. *Cf.* Callman, Unfair Competition and Trade Marks, § 24.2(b) (1); Nims, Unfair Competition and Trade Marks (4th ed.) 76, 84. As a matter of fact, there is here involved the direct antithesis of the substitution problem. The pharmacist is legally obligated *not* to substitute.

In final analysis, the good will fiction never contemplated prescription drugs. It assumes competition in over-the-counter articles. Unless the articles are over-the-counter goods, this convenient fiction has no application whatsoever.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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This is to certify that copies of this brief have been served on opposing counsel on this the .... day of July, 1955.

.....

APPENDIX.

Louisiana Fair Trade Law.

Act No. 13, Louisiana Acts of 1936; now codified as §§ 391 to 396, inclusive, of Title 51, Louisiana Revised Statutes of 1950.

An Act to protect trade mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade mark, brand or name.

§ 391. *Producer and commodity defined*

As used in this Sub-part:

"Producer" means grower, baker, maker, manufacturer, or publisher.

"Commodity" means any subject of commerce.

§ 392. *Contracts restricting resale price valid*

No contract, relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer of the commodity and which is in fair and open competition with commodities of the same general class produced by others, shall violate any law of this state by reason of any of the following provisions which may be contained in the contract:

(1) That the vendee shall not resell the commodity at less than the minimum price stipulated by the vendor;

(2) That the vendee or producer require in delivery to whom he may resell the commodity, an agreement that the second vendee will not, in turn, resell at less than the minimum price stipulated by the vendor or by the vendee.

§ 393. *Exceptions to contracts*

The provisions authorized in a contract by R.S. 51:392 shall not apply in the following cases:

(1) In closing out the owner's stock for the purpose of discontinuing delivery of the commodity;

(2) When the goods are damaged or deteriorated in quality, and notice is given to the public;

(3) Where an officer is acting under the orders of court.

§ 394. *Breach of contract; unfair competition*

Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the minimum price stipulated in any contract entered into pursuant to the provision of R.S. 51:392, whether the person so advertising, offering for sale, or selling is or is not a party to the contract, is unfair competition and is actionable by any person damaged.

§ 395. *Exemptions*

This Sub-part shall not apply to any contract between producers, or between wholesalers, or between retailers as to sale or resale prices.

§ 396. *Name of Sub-part*

This Sub-part may be cited as "Fair Trade Law."

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Petitioners,

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Respondent.

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BRIEF IN OPPOSITION.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF IN OPPOSITION.

Hoffmann-La Roche Inc., respectfully opposes the petition filed by Schwegmann Brothers Giant Super Markets, *et al.*, for a writ of certiorari.

Statement of the Case.

The United States District Court for the Eastern District of Louisiana granted an injunction against Schwegmann Brothers Giant Super Markets, and all of the individual partners thereof (hereinafter referred to as Schwegmann), enjoining and restraining them "from in any manner or by any means, direct or indirect, advertising for sale, offering for sale, or selling" all Fair Traded com-

modities manufactured by Hoffmann-La Roche Inc. (a drug manufacturer) at prices below those which had been established under the Louisiana Fair Trade Law. In addition, the injunction specified by name certain of said commodities including two trade marked prescription products known as "Gantrisin" and "Syntrogel" (Tr. 28-31).

The partnership and each individual defendant were served with a copy of the injunction (Tr. 61).

Subsequently Schwegmann intentionally advertised and sold Hoffmann-La Roche Inc., Fair-Traded prescription items at less than Fair Trade prices. This they did on the theory that they could evade the injunction and the Louisiana Fair Trade Law merely by stripping the Hoffmann-La Roche Inc., trade-marks and trade names from the drugs at the moment of sale, despite the fact that these products were specifically designated and requested by trade name in the particular prescriptions being filled. Moreover, the record shows that the "Gantrisin" tablets sold by Schwegmann continued to bear the distinctive trade-mark "HLR" in the hands of the ultimate purchasers (Tr. 77, 78, 79, 99, 100).

In furtherance of their scheme to evade the provisions of the injunction and the Louisiana Fair Trade Law, Schwegmann went so far as to advertise various "over the counter" (non-prescription) items in the local newspapers, suggesting that if the customer would obtain a prescription from a physician, such items as mineral oil would be sold at less than Fair Trade prices (Plaintiff's Exhibit 12, Tr. 80-84). In their newspaper advertisements Schwegmann then "dared" and "defied" the manufacturers to protect their trade-marks and trade names on items sold through prescriptions at the Schwegmann stores (Tr. 144). Some of these advertisements read as follows:

(a) September 8, 1952—"Price-fixing 'Fair Trade' is the law of the land. But at Schwegmann Bros., in spite of manufacturers' threat of Court action and jail, we are now selling thousands of price-fixed 'Fair Traded' necessities of life and sickness, for less."

(b) September 15, 1952—"We plead guilty to the 'crime' of selling every item, every day at the lowest possible price. Our contempt for the un-American price fixing 'Fair Trade' system is only exceeded by our determination to save more money for our customers."

(c) September 22, 1952—"We defy any manufacturer to stop us from giving our customers these benefits."

(d) November 3, 1952—"There will be no change in our policy of pricing all of our merchandise at the very lowest prices every day. We will fight every manufacturer who drags us into the Courts for the purpose of forcing us to increase our prices; we will fight the unjust price-fixing laws through the United States Supreme Court again if it becomes necessary" (Tr. 143).

The extent to which Schwegmann further defied the injunction of the Court below is exhibited by the fact that on November 7, 1953, they advertised that they would sell "Syntrogel" at less than the minimum resale price, if the customer would obtain a prescription from a physician, knowing full well that at the time of the placing of the advertisement the injunction of May 15, 1953 expressly prohibited " * * * in any manner or by any means, direct or indirect, advertising for sale, offering for sale, or selling * * * " "Syntrogel" (Tr. 29, 30).

The Louisiana Fair Trade Law provides that willfully and knowingly advertising, offering for sale or selling Fair-

Traded commodities at less than Fair Trade prices is unfair competition (Tr. 27, 28; and Petition for Writ of Certiorari, p. 18).

Accordingly, Hoffmann-La Roche Inc., filed a petition to punish the partnership and the individual members thereof for contempt (Tr. 31).

After a hearing, the District Court Judge held that Schwegmann had sold the products of Hoffmann-La Roche at less than the minimum resale price (Tr. 145-149). He also held that an injunction cannot be collaterally attacked on contempt proceedings (Tr. 147). However, the Court declined to find Schwegmann guilty of contempt of court, for the reason that the Court was of the opinion that the original injunction should have specifically recited each of the items sold by Hoffmann-La Roche, with the Fair Trade price of each, relying upon Rule 65(d) of the Federal Rules of Civil Procedure (Tr. 149).

The District Court Judge then directed plaintiff to "prepare and submit to the Court a form of judgment which in all respects complies with the requirements of Rule 65(d) to replace the judgment found unenforceable herein" (Tr. 149). Thereafter, on June 23, 1954, a comprehensive judgment of injunction, including all of the Fair-Traded items sold by Hoffmann-La Roche Inc., together with the minimum retail price of each item, was rendered by the District Court Judge (Tr. 159-171). On June 25, 1954 the Court entered a judgment denying the petition to punish for contempt (Tr. 171).

On July 21, 1954 Schwegmann filed a notice of appeal from the judgment dated June 23, 1954 (Tr. 172); and on July 23, 1954 Hoffmann-La Roche Inc. filed notice of appeal from the judgment dated June 25, 1954, denying plaintiff's petition to punish the defendants for contempt.

On April 22, 1955 the United States Court of Appeals for the Fifth Circuit affirmed the judgments appealed from, with respect to both appeals (221 F. (2d) 326).

Neither party applied for a rehearing; but Schwegmann Bros. subsequently filed a petition for a writ of certiorari. Hoffmann-La Roche Inc. now files this opposition to the petition.

Questions Presented.

1. Have petitioners complied with the provisions of Rule 23 of the Supreme Court Rules?

2. Have petitioners shown that this case meets the requirements of Rule 19 of the Supreme Court Rules and the numerous decisions of this Honorable Court to the effect that jurisdiction to review by certiorari should be sparingly exercised, and is granted only under very special circumstances?

3. Did Schwegmann have a right to test the validity or scope of the original injunction by self help and self construction without the aid or assistance of the Court as authorized by Rule 60(b) of the Federal Rules of Civil Procedure.

4. Assuming (but denying) that Schwegmann had a right to self-interpretation of the injunction without aid or assistance of a court, may Schwegmann escape the provisions of the injunction and of the Louisiana Fair Trade Law merely by removing at the time of sale the trademarks and trade names of the manufacturer, where the items in question were specifically ordered by trade name or brand?

Petitioners concede that there is no constitutional question at issue, and that there is no dispute as to the facts (Petition, p. 4).

ARGUMENT.

I.

The petition fails to comply with the rules of this Court.

A.

The petition fails to comply with Rule 23 of the Rules of the Supreme Court. The petition does not include a "concise statement of the grounds on which the jurisdiction of this court is invoked" (as distinguished from "the statutory provision believed to confer on this court jurisdiction to review the judgment or decree in question by writ of certiorari"); nor does the petition properly set forth "the questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail"; nor does the petition contain "a concise statement of the case containing the facts material to the consideration of the questions presented"; nor does the petition "show the basis for Federal jurisdiction in the court of first instance"; nor does the petition contain "a direct and concise argument amplifying the reasons relied on for the allowance of the writ"; nor does the petition present in understandable or chronological sequence the proceedings upon which the opinion and decree of the Court of Appeals for the Fifth Circuit are based.

B.

In accordance with the provisions of Rule 23 (4) "the failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition". The petition does not meet the foregoing requirements.

C.

As stated in Rule 19 of the Supreme Court Rules, "a review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor". Petitioners have not brought this case within any of those circumstances described in Rule 19 (1)(a) or (b); nor have they presented any set of circumstances which would support the issuance of a writ of certiorari.

D.

Writs of certiorari to review judgments of the Circuit Courts of Appeals are only granted under special circumstances. *State of Ohio ex rel. Seney* v. *Swift & Co.,* 43 S. Ct. 22, 260 U. S. 146, 67 L. Ed. 176. Jurisdiction to review by certiorari is sparingly exercised, and only in cases of singular gravity and general importance, or in cases affecting relations with foreign governments, or to secure uniformity of decisions. *Ex parte Lau Ow Bew,* 1891, 12 S. Ct. 45, 141 U. S. 583, 35 L. Ed. 868. See, also, *Houston Oil Co.* v. *Goodrich,* Tex. 1918, 38 S. Ct. 140, 245 U. S. 440, 62 L. Ed. 385; *Hamilton-Brown Shoe Co.* v. *Wolf,* Mo. 1916, 36 S. Ct. 269, 240 U. S. 251, 60 L. Ed. 629; *U. S.* v. *Rimer,* N. C. 1911, 31 S. Ct. 596, 220 U. S. 547, 55 L. Ed. 578; *McClellan* v. *Carland,* S. D. 1910, 30 S. Ct. 501, 217 U. S. 268, 54 L. Ed. 762; *Fields* v. *U. S.,* Dist. Col. 1907, 27 S. Ct. 543, 205 U. S. 292, 51 L. Ed. 807; *Forsyth* v. *Hammond,* Ind. 1897, 17 S. Ct. 665, 166 U. S. 506, 41 L. Ed. 1095; *The Three Friends,* Fla. 1897, 17 S. Ct. 495, 166 U. S. 1, 41 L. Ed. 897; *American Construction Co.* v. *Jacksonville, T. & K. W. Ry. Co.,* Fla. 1893, 13 S. Ct. 758, 148 U. S. 372, 37 L. Ed. 486; *Lau Ow Bew* v. *U. S.,* Cal. 1892, 12 S. Ct. 517, 144 U. S. 47, 36 L. Ed. 340; *In re Woods,* Minn. 1892, 12 S. Ct. 417, 143 U. S. 202, 36 L. Ed. 125.

II.

There is no basis for the granting of a writ of certiorari.

Counsel for petitioners predicate their entire position upon the following language in the *Old Dearborn* case:

> "There is nothing in the act to preclude the purchaser from removing the mark or brand from the commodity—thus separating the physical property, which he owns, from the good will, which is the property of another—and then selling the commodity at his own price, *provided he can do so without utilizing the good will of the latter as an aid to that end.*" (Italics ours.)

Old Dearborn Distributing Co. v. *Seagram-Distillers Corp.*, 299 U. S. 183, 195 (1936).

However, the District Court and the Circuit Court found that Schwegmann had utilized the good will of Hoffmann-La Roche as an aid in making the sales.

It is obvious that when a customer comes in with a prescription which designates a trade-marked product, the retailer cannot evade the provisions of the Fair Trade law by merely stripping the trade-mark of the manufacturer from the commodity at the moment of sale, since the good will of the latter has already been utilized.

The soundness of this conclusion can be readily understood in view of the following:

Hoffmann-La Roche Inc., has for many years produced and sold pharmaceutical preparations and products throughout the United States and in foreign countries, for sale to the public, in some cases on prescription only

and in others by direct consumer purchase over-the-counter (Tr. 56).

Hoffmann-La Roche Inc., engages in promotional and advertising activities which are the usual methods adopted by pharmaceutical manufacturers; but its products are not advertised directly to the lay public. They are promoted directly to physicians, other licensed practitioners in the healing arts, pharmacists and hospital personnel. Professional service representatives employed by Hoffmann-La Roche Inc., call upon physicians and other licensed practitioners to acquaint them with the products and the trade names by which the products are known, and their ingredients, properties, indications and contra-indications (Tr. 57, 58).

These promotional activities are undertaken for the purpose of convincing the physicians and other licensed practitioners that the products of Hoffmann-La Roche Inc. are more desirable than the products of other manufacturers, and further, for the purpose of impressing upon them the importance of prescribing or otherwise ordering the products by their trade names (Tr. 57, 58).

In the year preceding the trial in the District Court, Hoffmann-La Roche Inc., had spent in excess of $4,500,000.00 in the promotion of its products (Tr. 104).

The Schwegmanns filled prescriptions for trade-marked Hoffmann-La Roche Inc., products for less than the Fair Trade prices; these sales were made either by replacing original labels on the packages, or by transferring drugs from original trade named packages; and in making these sales the Schwegmanns were aware of the trade names of the products as called for in the prescriptions and the trade names of the products as filled pursuant to the prescriptions (Tr. 61, 62, 63).

The purpose of the Louisiana Fair Trade Act, as set forth in its title, is as follows:

> "To protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade mark, brand or name" (Louisiana Act 13 of 1936).

It would seem clear that upon a specific request for a fair-traded, trade-marked product, the trade-mark owner's good will is irrevocably involved; and a retail seller may not then remove the trade-mark and thereby escape the provisions of the Fair Trade Law. On the other hand, if a buyer simply asks for an article for an indicated purpose, such as "a medicine for a headache", relying on the retailer to supply him with a suitable commodity, the retailer could offer his own brand, or an unidentified package, and such sale would be exempt from the Fair Trade Law under the *Old Dearborn* ruling. This would be true even though the merchandise may physically be a fair-traded product. However, if the purchaser specifically orders, for example, "Bayer Aspirin", then the good will of the manufacturer of "Bayer Aspirin" has obviously become involved. The seller, under the *Old Dearborn* decision, may not then sell the "Bayer" product at a price below the Fair Trade minimum, even though he changes the package at the point of purchase by removing the name "Bayer" therefrom and from the individual tablets.

If the resale price of "Coca-Cola" were regulated by Fair Trade contracts at five cents, it could not successfully be contended that the price minimum could be avoided merely by offering the beverage, when "Coca-Cola" is specifically ordered, in a bottle or glass which made no reference to "Coca-Cola". Once "Coca-Cola" has been

ordered, it becomes legally immaterial whether the container, bottle or package repeats the use of the famous trade-mark.

Authorities directly in point are *Pinesbridge Farm, Inc.* v. *Bloomingdale Bros., Inc.*, 176 Misc. 179, 26 N. Y. S. (2d) 1005; *Johnson & Johnson* v. *Weissbard Brothers*, 121 N. J. Eq. 585, 191 Atl. 873; *Callmann, "Unfair Competition and Trade-Marks"*, 2nd Edition, Section 24.2(b)(1).

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Certificate.

I certify that I am a member of the bar of the Supreme Court of the United States, and that on this day of August, 1955, I have served copies of this brief on opposing counsel personally, delivering same to them at their office at 1200 Whitney Building, New Orleans, Louisiana.

MURRAY F. CLEVELAND.